IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

INSTITUTE FOR FREE SPEECH, a nonprofit corporation and public interest law firm, Plaintiff, v. JAMES TINLEY, in his official capacity as Executive Director of the Texas Ethics Commission, *et al.*; Defendants.	No. 1:23-cv-01370-DAE-ML

PLAINTIFF'S STATEMENT OF APPEAL RE: MAGISTRATE JUDGE LANE'S DECEMBER 2 ORDER ON MOTION TO COMPEL

The Institute for Free Speech respectfully submits this appeal regarding Magistrate Judge Lane's December 2 order, pursuant to Fed. R. Civ. P. 72(a), 28 U.S.C. § 636(b)(1)(A), and Rule 4(a) of App. C of the Local Rules. Plaintiff objects to the finding that the Fifth Circuit's mandate did not foreclose discovery into both merits and jurisdiction, and also to Judge Lane's decision to grant Defendants' motion to compel, despite IFS's rule-based objections concerning the motion's timeliness. Dkt. 69 at 3-4.

The judge's order misread the Fifth Circuit's opinion and failed to effect the letter and the spirit of an appellate court's mandate on remand. *See Lion Elastomers, L.L.C. v. NLRB*, 108 F.4th 252, 259 (5th Cir. 2024). The order permitted the Texas Ethics Commission (TEC) to seek discovery in order to reexamine issues of fact and law that the circuit already decided, especially standing.

Moreover, the order violates the Federal Rule of Civil Procedure by granting the TEC's motion to compel discovery, even though the magistrate judge found that parties had not held the required Rule 26(f) Conference. Dkt. 69 at 3 n.2. Implicitly, the magistrate judge appeared to construe the TEC's motion as a Rule 26(d)(1) motion for early discovery and granted that motion without requiring the TEC to meet the higher burden of the "good cause standard" applicable to such motions. *See, e.g.*, *Leyva v. Bascai, Inc.*, No. 1:23-CV-01348-DII, 2024 U.S. Dist. LEXIS 21205, at *13 (W.D. Tex. Feb. 6, 2024); *Accruent v. Short*, No. 1:17-CV-858-RP, 2017 U.S. Dist. LEXIS 220364, at *2 (W.D. Tex. Nov. 8, 2017). Nor did the magistrate judge address the problem of untimely service under Rule 26(d)(2)(B), ordering IFS to respond within 17 days and without the benefit of a Rule 26(f) conference, the full 30 days for Rule 34 requests, or an opportunity to appeal. This Court should sustain IFS's objections.

STATEMENT OF FACTS

IFS, a nonprofit corporation, has often represented non-Texas candidates or political committees in constitutional challenges to state election laws and wishes to do this in Texas as well. Dkt. 44-1 at 3-4, 9; Dkt. 57-2 at 10-16. But the TEC—the agency responsible for enforcing the Texas Election Code—considers it a felony for nonprofit firms to provide pro bono legal services to Texas candidates or political committees. Dkt. 44-1 at 3-5; Dkt. 57-2 at 12-14; *see also* TEX. ELEC. CODE § 251.001(21), § 253.094. In August 2023, IFS bought a purely legal pre-enforcement challenge, arguing that TEC's regulatory regime unconstitutionally burdens IFS's right to associate, speak, and petition through pro bono litigation and that 42 U.S.C. § 1983 pre-empts the regime. Dkt. 1.

On August 30, 2024, the Court dismissed IFS's suit on standing and mootness grounds. Dkt. 40. But the Fifth Circuit reversed in part, holding that "IFS has

Article III standing" because it had "carried its burden to show that it has sustained a pre-enforcement injury, which both is traceable to the Commissioners' potential enforcement of Section 253.094 and redressable here." Dkt. 44-1 at 15. The circuit also held that "[n]o further factual questions require resolution for the adjudication of [IFS's] claims." *Id.* at 21. As a result, the circuit remanded the case, with instructions for this Court to "explore in the first instance" "the merits of [IFS's] First Amendment claims." *Id.* at 22 & n.6.

On remand, IFS filed a second motion for summary judgment on the merits of the case. *See* Dkt. 57; Dkt. 57-1. The TEC, in contrast, noticed depositions and served lengthy requests for documentary production to both IFS and two non-parties. Dkt. 55-2; Dkt. 55-4; Dkt. 55-5. IFS and the non-parties both objected to these discovery requests as violating the Fifth Circuit's mandate, overbroad, disproportionate, and premature—because no 26(f) conference has yet occurred. Dkt. 55-3; Dkt. 55-6; Dkt. 55-7.The TEC moved to compel. Dkt. 55.

On December 2, 2025, following referral from this Court, Magistrate Judge Lane granted the TEC's motion to compel and ordered both the IFS and the non-parties to produce responsive documents by December 19, 2025. Dkt. 69 at 3-4. The order did not reach "the specific objections" that IFS and the non-parties made concerning the breadth, relevance, and proportionality of the requests for production. *Id.* Instead, the magistrate judge encouraged parties to resolve those objections on their own, if possible. *Id.*

On December 9, 2025, this Court denied without prejudice Plaintiff's pending motion for summary judgment, stating that, "[i]n light of Judge Lane's Order Granting Defendant Tinley's Motion to Compel (Dkt. # 69)," Plaintiff's motion for summary judgment could be "refil[ed] after compliance with Judge Lane's order."

ARGUMENT

I. The order disregards explicit language in the Fifth Circuit's opinion foreclosing discovery

The Fifth Circuit's opinion forecloses discovery (as briefing stressed, see Dkt. 59 at 4-6, Dkt. 61 at 7-8), and the magistrate judge's order does not offer any alternative interpretation of the meaning of this express language. The circuit held that "[n]o further factual questions require resolution for adjudication of [IFS's] claims." Dkt. 44-1 at 21. Additionally, the Fifth Circuit concluded that "IFS has Article III standing" because "IFS has carried its burden to show that it has sustained a pre-enforcement injury, which both is traceable . . . and redressable here." Dkt. 44-1 at 15. The circuit already decided that IFS has standing and that no discovery is necessary—rulings binding on this Court and the parties alike.

The order's "procedural history" mentions some (but not) of this language in the Fifth Circuit's opinion. *See* Dkt. 69 at 1-2. But the order never explains what this language means or presents any alternative interpretation of the wording.

Instead, the magistrate judge attempts to side-step this language, noting that the circuit was reviewing a Rule 12(b)(6) motion to dismiss—rather than a summary judgment—and that the opinion states that IFS "sufficiently alleges" standing and ripeness. *Id.* at 3. According to the magistrate judge, then, the Fifth Circuit's opinion was merely "a judgment regarding the pleadings stage" and it is "nonsensical" that a judgment regarding pleadings would or could foreclose discovery through the mandate rule. *Id.*

This reasoning ignores both how the mandate rule operates and the text of the Fifth Circuit's opinion. The mandate rule does not merely prevent district courts from reexamining the specific motion that was decided on appeal. It prohibits the district court "from reexamining an *issue* of law or fact previously decided on appeal and not *resubmitted* to the trial court on remand." *United States v. Pineiro*, 470 F.3d

200, 205 (5th Cir. 2006) (citations omitted) (emphasis added). And it is not just the narrow, end result of an appeal that cannot be reexamined. Even "relitigation of issues . . . impliedly decided" is prohibited. *United States v. Hoffman*, 70 F.4th 805, 812 (5th Cir. 2023) (citation omitted).

The mandate rule, thus, often prevents district courts from revisiting issues that were collateral to the motion under appeal, when—as here—those issues were explicitly or implicitly decided. District courts must "proceed within the letter and spirit of the mandate by taking into account the appeals court's opinion and the circumstances it embraces." *Lion Elastomers*, 108 F.4th at 259 (citation omitted). The magistrate judge's order disregards binding precedent, then, by treating the mandate rule as if it only concerns the appeal's specific result.

The Fifth Circuit held that IFS had carried its burden of *proving jurisdiction*—not merely that IFS's allegations met a pleading requirement. Although the circuit only reversed a 12(b)(1) dismissal, the circuit had "considerable briefing" and evidence before it—not just bare pleadings. Dkt. 44-1 at 6, 22 n.6. Indeed, the Fifth Circuit spoke of "resolution" of facts twice in its opinion. Once, when the circuit held that "[n]o further factual questions require resolution for adjudication of [IFS's] claims." *Id.* at 21. And another time, when the circuit explained that, when reviewing a Rule 12(b)(1) dismissal, it could assess jurisdiction based on "undisputed facts evidenced in the *record*" and "the court's *resolution* of disputed facts"—not just on the complaint alone. Dkt. 44-1 at 6. (citation omitted) (emphasis added). The Fifth Circuit, that is, stated that it could rely both on allegations in the pleadings and on facts in the record.

The circuit then proceeded, in the course of its opinion, to cite repeatedly both allegations *and* record evidence (including a witness declaration) and to resolve

underlying material facts. *See, e.g.*, *id.* at 12 n.4, 15, 17.[1] It resubmitted IFS's case to the district court, see *Pineiro*, 470 F.3d at 205, so the district court could apply those resolved facts to law in the first instance, *see* Dkt. 44-1 at 22 n.6.

The Fifth Circuit's opinion is unambiguous: **No facts remain needing resolution.** The circuit was not just referring to allegations in a pleading, for allegations are not "factual questions" nor are they capable of "resolution." *Cf. id.* at 21. The circuit's holding about facts was just that: a holding about facts, not allegations. And even if a fact has been only implicitly decided, see *Hoffman*, 70 F.4th at 812, while ruling on a 12(b)(6) motion, the magistrate judge still violated the mandate rule by allowing that fact to be reexamined.

II. The order wrongly insists that IFS must prove standing again

IFS's standing is a settled issue. To suggest otherwise is clearly erroneous and contrary to law. IFS need not re-litigate standing at every stage of the case. "As with all questions of subject matter jurisdiction except mootness, standing is determined as of *the date of the filing* of the complaint." *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 460 (5th Cir. 2005) (cleaned up) (emphasis added). Thus, "once the plaintiff shows standing at the outset, she need not keep doing so throughout the lawsuit." *Hartnett v. Pa. State Educ. Ass'n*, 963 F.3d 301, 305 (3d Cir. 2020). If "a plaintiff has standing at the outset," that case may later "become[] moot," but standing permanently exists. *Fontenot v. McCraw*, 777 F.3d 741, 747 (5th Cir. 2015) (citations omitted). And Defendants, not IFS, bear "the heavy burden of

[1] The TEC asserts that it is entitled to use discovery to challenge certain statements in non-party Chris Woolsey's declaration, concerning that Woolsey's status as a "candidate" under Texas law and his intention to run for re-election. *See* Dkt. 55 at 6. But the Fifth Circuit found that "Woolsey is a candidate" and cited his declaration as credible. Dkt. 44-1 at 17. The magistrate judge's order permits the TEC to relitigate the circuit's binding resolution of facts.

demonstrating mootness." *Tucker v. Gaddis*, 40 F.4th 289, 292 (5th Cir. 2022) (cleaned up).

The Fifth Circuit already held that "IFS has Article III standing" because IFS already "carried its burden to *show* a pre-enforcement injury"—not merely to plead it. *Id.* at 8, 13, 15 (emphasis added). The magistrate judge's opinion never even mentions this language, see Dkt. 69, and permits Defendants to seek discovery into jurisdictional issues that the circuit already decided, *see, e.g.*, Dkt. 55-2 at 8-12. Indeed, the defendants signal that they intend to use discovery as a fishing expedition through the documents of IFS and two non-parties with the goal of filing a *second* motion to dismiss on standing. *See, e.g.*, Dkt. 55 at 4; Dkt. 52 at 2. The mandate rule exists to safeguard "the orderly administration of justice" by "preventing obstinate litigants from repeatedly reasserting the same arguments." *Pineiro*, 470 F.3d at 205. Evidently, Defendants plan to act exactly in the way that the mandate rule forbids.

The Fifth Circuit held that "IFS *has* Article III standing," Dkt. 44-1 at 15 (emphasis added). This cannot be reinterpreted to mean instead "IFS offers allegations in its complaint, which if taken as true, are sufficient to plead Article III standing." Both the letter and the spirit of the circuit's opinion refute this. That IFS has proved standing is the binding law of the case. Defendants cannot be permitted to relitigate the circuit's resolution of these issues of fact and law.

Instead of engaging with the actual language of the Fifth Circuit's opinion, the order merely quotes the Supreme Court's opinion in *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) for the truism that the pleading, summary judgment, and trial stages have different requirements. Dkt. 69 at 3. As *Lujan* observes, a plaintiff at the pleading phase can satisfy the burden through "mere allegations," without providing evidence of "specific facts." 504 U.S. at 561 (citations omitted). This is

why, as the Fifth Circuit noted, a court can assess standing by examining "the complaint alone." Dkt. 44-1 at 6 (citation omitted).

But an appeals court is not required to look at the complaint alone. Rather, as the Fifth Circuit stated, it can also look to "undisputed facts evidenced in the *record*" and "the court's *resolution* of disputed facts." *Id.* (citation omitted) (emphasis added). In this case, the circuit did exactly that, repeatedly citing both allegations *and* record evidence to resolve specific facts. *See, e.g.*, *id.* at 12 n.4, 15, 17. The circuit already examined record evidence—not just pleading allegations—and decided that IFS has Article III standing. IFS has no obligation to prove standing again at later stages—contrary to the Magistrate Judge's statement that "[s]tanding does linger on" to be tested and reexamined again after discovery. Mot. to Compel Hr'g Tr. 26:16-25. The mandate rule does not permit the TEC to keep relitigating standing when the Fifth Circuit resolved that issue.

III. The order violates Rule 26(d) by permitting the TEC to pursue early discovery without showing good cause

The magistrate judge's order violates the civil rules by compelling IFS to respond to premature discovery that was not properly served on IFS because it was sent during the pre-Rule 26(f) conference discovery moratorium. The Federal Rules of Civil Procedure require a Rule 26(f) conference before discovery commences *or is deemed served,* unless a court authorizes early discovery or the parties stipulate to it. Fed. R. Civ. P. 26(d)(1). It is undisputed that no Rule 26(f) conference took place before Defendants sent—but by operation of Rule 26(d)(2)(B), did *not* serve their discovery.[2]

[2] And this Court has not issued a preliminary scheduling order or request for a joint-status report. Nor have Defendants requested permission to conduct discovery without first conducting the required Rule 26(f) conference.

The rules are explicit on this point: "[a] party may *not* seek discovery from *any source* before the parties have conferred as required by Rule 26(f)." Fed. R. Civ. P. 26(d) (emphasis added). Subpoenas and discovery requests made before parties have conferred to develop a discovery plan are "invalid." *Crutcher v. Fid. Nat'l Ins. Co.*, No. 06-5273, 2007 U.S. Dist. LEXIS 8208, at *5, *8 (E.D. La. Feb. 5, 2007); *see also Does v. Kappa Alpha Theta Fraternity Inc.*, Civil Action No. 3:22-cv-1782, 2022 U.S. Dist. LEXIS 237820, at *1 (N.D. Tex. Aug. 19, 2022) (quashing a subpoena that violated Rule 26(d)(1)).

The magistrate judge found that the parties had not yet held a Rule 26(f) Conference—but ignored that requirement. Dkt. 69 at 3 n.2. Here, the TEC emailed discovery requests to IFS on September 29, Dkt. 55-2 at 3, and moved to compel exactly 30 days later, on October 28, *see* Dkt. 55 at 9, without waiting for a 26(f) conference. Although parties are allowed to send document requests before the discovery conference, these early requests are "considered to have been served at the first Rule 26(f) conference." Fed. R. Civ. P. 26(d)(2)(B). "Requests prior to a Rule 26(f) conference" are "designed to facilitate focused discussion during the 26(f) conference" because that discussion could even "produce changes in the requests." *Cook v. Craus*, No. 19-835-JWD-RLB, 2020 U.S. Dist. LEXIS 46926, at *3 (M.D. La. Mar. 18, 2020) (citing Advisory Committee Notes to the 2015 Amendment). Emailing a request to opposing counsel before a 26(f) conference is not a form of proper service and does not create any obligation to respond on the part of the receiving party.[3]

[3] The order claims that the TEC "served IFS with requests for production and served Woolsey and Cheshire with subpoenas duces tecum." Dkt. 69 at 2. But this contradicts the magistrate judge's finding that that parties have not yet held a Rule 26(f) Conference. *See id.* at 3 n.2. Under Rule 26(d)(2)(B), discovery requests are not

IFS has not refused to hold a 26(f) conference. Instead, IFS has consistently stated, *see* Dkt. 55-3 at 2; Dkt. 55-8 at 3, that it will participate in such a conference if this Court determines that the Fifth Circuit's mandate permits discovery on some unresolved factual question, subject to IFS's right to appeal such a decision or file a mandamus petition. If the TEC believed that it needed expedited discovery without waiting for a 26(f) conference, it could have pursued two remedies consistent with the rules.

First, the TEC could have asked this Court to compel Plaintiff to participate in a 26(f) conference—but it did not do so. *See, e.g.*, *Valadez v. Fed. Express Corp.*, No. 5:25-CV-0354-JKP, 2025 U.S. Dist. LEXIS 104753, at *4 (W.D. Tex. June 2, 2025) (resolving a motion to compel participation in a 26(f) conference); *Jana v. Walmart, Inc.*, No. 4:24-CV-00698-SDJ-BD, 2025 U.S. Dist. LEXIS 40138, at *3 (E.D. Tex. Mar. 6, 2025) (similar); *Int'l Turbine Servs. v. Puerto Quetzal Power*, LLC, No. 1:21-CV-1154 (RP), 2022 U.S. Dist. LEXIS 227449, at *6 (W.D. Tex. Aug. 4, 2022) (similar). And the magistrate judge did not order IFS participate in a 26(f) conference, although he suggested that the parties should. *See* Dkt. 69 at 3 n.2.

Second, the TEC could have moved for early discovery under Rule 26(d)(1) rather than improperly sending it and then moving to compel—a process not authorized by the rules. The party seeking expedited discovery "bears the burden to show good cause, and the subject of the request should be narrowly tailored in scope." *Leyva*, 2024 U.S. Dist. LEXIS 21205, at *13 (cleaned up). Courts within the Fifth Circuit determine if good cause exists by looking to factors such as (1) whether a preliminary injunction is pending; (2) the breadth of the discovery requests; (3) the

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served until the 26(f) conference. The magistrate judge's order ignores the plain text of that rule, which was designed to facilitate orderly discovery.

purpose for requesting the expedited discovery; (4) the burden on the producing party; and (5) how far in advance of the typical discovery process the request was made. *Accruent*, 2017 U.S. Dist. LEXIS 220364, at *2-3; *see also Leyva*, 2024 U.S. Dist. LEXIS 21205, at *13-14 (similar list of factors).

Demonstrating a good cause for early discovery, then, requires meeting a higher burden than an ordinary discovery request, and early discovery must be narrowly tailored in scope. Implicitly, the magistrate judge appears to have construed the TEC's motion to compel as a Rule 26(d)(1) motion for early discovery, filed prior to the parties' discovery conference. *See* Dkt. 69 at 3-4. But the magistrate judge did not require that the TEC satisfy its higher burden of demonstrating good cause. And the TEC's requests to IFS and to two non-parties were not narrowly tailored, but rather extremely broad and burdensome. *See* Dkt. 61 at 2-7; Dkt. 55-2 at 8-12; Dkt. 55-4 at 12-13; Dkt. 55-5 at 12-13. And IFS was left with a mere 17 days to comply.

The TEC has not shown good cause and narrow tailoring. But the magistrate judge's order allows them to sidestep these requirements, by allowing what was effectively a Rule 26(d)(1) motion for early discovery to be treated just like a plain-vanilla motion to compel, judged on a more lenient standard. The discovery requests that the TEC sent on September 29 were invalid and—by operation of Rule 26(d)(2)—are not considered served on IFS until the Rule 26(f) conference, from which time IFS would get a full 30 days to respond, as is set forth in the plain text of the rules. The magistrate judge's order improperly ignores the civil rules and allows the TEC to obtain early discovery without meeting its burden.

CONCLUSION

This Court should reverse the magistrate judge's order and deny the TEC's motion to compel.

Respectfully submitted,

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